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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 155

DONALD S. CREAMER, *Petitioner*

v.

THE UNITED STATES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS
BRIEF OF AMICUS CURIAE GOVERNMENT EMPLOYES' COUNCIL, AFL-CIO

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INTRODUCTION

This brief of Amicus Curiae is filed pursuant to Rule 42 of the Supreme Court Rules with the consent of all parties to this case.

The Government Employes' Council of the American Federation of Labor and Congress of Industrial Organizations (hereinafter referred to as "the Council") consists of 31 AFL-CIO unions, representing federal employees, the combined membership of which

totals approximately 1,000,000 federal employees, or about 45% of all persons employed by the United States Government. Historically, the Council and its associated unions have been deeply interested in all important legal questions and legislative matters which critically affect employees of the United States; and, because the instant case involves three such questions of substantial importance to federal employees generally, the Board of officers of the Council voted unanimously to file this brief to urge the Court to grant a writ of certiorari herein and to settle authoritatively the issues raised by the decision of the Court of Claims, which decision the Council believes to be erroneous, unsound and detrimental to all classified federal employees.

QUESTIONS PRESENTED

As stated above, this case presents three questions of serious importance to federal employees generally. These questions are as follows:

1. May federal agencies arbitrarily deny in-grade statutory pay increases to their employees under 5 U.S.C. 1121 through the adoption and use of performance rating systems which do not meet the standard minimum requirements of the Performance Ratings Act of 1950 and which violate the prohibitions of 5 U.S.C. 2003, which bar the use of rating systems not specifically approved by the United States Civil Service Commission?

2. May federal agencies, in violation of the prohibitions or restrictions of their own Regulations and of the statutory protections afforded to veterans' preference federal employees by the Veterans Preference Act of 1944, reduce or cancel statutory increases in pay which have already ac-

crued to such employees and simultaneously deny the right of any appeal to the Civil Service Commission?

3. Whether the "Acceptable Level of Competence" provisions of the Federal Salary Reform Act of 1962 (5 U.S.C. 1121 (a)), as arbitrarily and capriciously applied in the case before the Court as set forth in the petition for certiorari, violate Article I, Sections 1 and 8 of the Constitution and the Fifth Amendment to the Constitution?

STATUTES INVOLVED

The pertinent provisions of the statutes involved are set forth in Appendix A hereto.

REASONS WRIT SHOULD BE GRANTED: ARGUMENT

I

Performance Evaluation Systems Under 5 U.S.C. 1121 Must Meet the Minimum Standards Prescribed by the Performance Ratings Act and They Must Not Violate the Prohibitions of 5 U.S.C. 2003.

The Council and its constituent unions earnestly submit that performance evaluation systems adopted by federal agencies to test the competence of federal employees under 5 U.S.C. 1121 must meet the minimum uniform standards prescribed for *all* performance ratings systems in the federal service by the Performance Ratings Act of 1950 (5 U.S.C. 2003); and that no such system can be administered by any federal agency until such system has first been approved by the Civil Service Commission in accordance with the requirements of 5 U.S.C. 2003.

The "acceptable level of competence" standard as prescribed by 5 U.S.C. 1121 as a statutory condition precedent to the granting of periodic in-grade pay increases for classified federal employees constitutes nothing more than simply another type of performance rating prescribed by Congress for federal employees. Accordingly, it is submitted that such ratings system, like all others in the federal service, is clearly subject to the prohibitions of 5 U.S.C. 2003, which states:

> "*Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating, and no such rating shall be used as the basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter.*" (Emphasis added)

If the Court concurs with the Council that the "acceptable level of competence" rating required by 5 U.S.C. 1121 is merely another type of *performance rating system,* then obviously the Court of Claims erred in its decision herein when it refused to apply the prohibitions of 5 U.S.C. 2003 to the performance evaluation system used by the Veterans Administration (*without any approval by the Civil Service Commission*) to deny petitioner his statutory in-grade increase in pay. The Council submits that what the Court of Claims did was to repeal judicially the prohibition of 5 U.S.C. 2003 insofar as same was intended to apply to *all* performance rating systems in the federal service, irrespective of the name or label given to such systems; and it did this by failing to apply the time-honored maxim that "where there are two Acts upon the same subject, the rule is to give effect to both if possible" (*United States* v. *Borden Co.*, 308 U.S. 188, 198; *United*

States v. *Zacks*, 375 U.S. 59; *Bell* v. *United States*, 366 U.S. 393).

As pointed out in the petition for certiorari herein, the vital significance of the erroneous decision of the Court of Claims to federal employees generally is quite apparent. Until the ruling in this case, the Council and its constituent unions and members took it for granted that *no performance evaluation system, regardless of the label, name or tag which might be placed on it, could be used as the basis for any personnel action until that system was first submitted to and approved by the Civil Service Commission* (5 U.S.C. 2003); and if the Commission disapproved a rating system because it did not meet the prescribed minimum requirements of the Performance Ratings Act, the system involved was forthwith discontinued (5 U.S.C. 2007). And, since 5 U.S.C. 2004 set forth plain and simple minimum requirements or standards to govern all such rating systems and since all such rating systems had to be approved by the Commission, rating systems throughout the Government were generally uniform and evenly administered by the various federal agencies; and the performance of all federal employees under such systems had to be *"fairly appraised in relation to such requirements"* as required by 5 U.S.C. 2004(2) and consequently, there was no room for arbitrary or capricious agency administration of performance or competence evaluations. Now, however, because of the Court of Claims decision herein, each federal agency would appear to have the unfettered right to evaluate the work performance of its employees for the purpose of in-grade pay increases in almost any manner it pleases, and it can do this on the basis of any evaluation or ratings system it might choose

to adopt, without the necessity of obtaining any prior review or approval from the Civil Service Commission.

All of this the Council submits, is not only directly contrary to the Performance Ratings Act of 1950, but it also conflicts with the clear Congressional purpose behind the recent 1965 amendment to The Federal Salary Reform Act of 1962 (5 U.S.C. 1121) itself (Public Law 89-301), wherein Congress specifically directed the Civil Service Commission to establish "uniform procedures" to govern agency *reconsiderations* of adverse "acceptable level of competence" determinations, and that federal employees be permitted to appeal directly to the Civil Service Commission from all such adverse determinations.

Thus, the Council believes the basic integrity of the *entire federal performance ratings structure* may be in danger of administrative erosion if the inroads approved by the Court of Claims' decision in this case are permitted to stand. Accordingly, the Council urges that the petition for certiorari be granted in this case and it prays that, after full study of the issues involved, this Court will reverse the Court of Claims herein and decree that performance evaluation systems under 5 U.S.C. 1121, *like all others used in the federal service,* are subject to the minimum requirements and prohibitions of the Performance Ratings Act of 1950.

II

Federal Agencies Must Not be Permitted to Ignore and Violate the Prohibitions and Limitations of Their Own Regulations When They Evaluate Federal Employees Under 5 U.S.C. 1121; and They Must Not be Allowed to Extend or Defeat Statutory Waiting Periods for In-Grade Pay Increases Through the Mere Device of Failing to Evaluate Employees Before the Waiting Period Expires.

Two of the most important decisions ever rendered by this Court insofar as federal employees are concerned were those in *Service* v. *Dulles,* 354 U.S. 363, and *Vitarelli* v. *Seaton,* 359 U.S. 535. In those cases, this Court established the rule that when any federal agency proceeds against a federal employee under its own Regulations, the agency must not ignore or violate any prohibitions, limitations or employee-protections therein prescribed; and, in the event an agency does ignore or violate its own Regulations, any adverse personnel action thereafter taken against the employee is null and void.

Yet, in the instant case, the Veterans Administration openly admitted that it did not follow its own Regulations when it denied an in-grade pay increase to petitioner herein and still the Court of Claims permitted that adverse personnel action to stand. The Agency's failure in this case was far from trivial. Its Regulations prescribed: "Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing", and such notification *must* "be given *prior* to the date on which the time-in-grade requirements for within-grade increase will be met."[1] This require-

[1] VA Manual MP-5, Chapt. 2 Interim Issue 5-169, October 18, 1962.

ment was basic and fundamental because Congress, in 5 U.S.C. 1121 specifically set forth the exact lengths of time federal employees were to be made to enact for their in-grade pay increases, and Congress stated that such increases were to take effect in each case immediately upon expiration of each such waiting period. Consequently, it is crystal clear that Congress did not intend that federal agencies were to have the right arbitrarily, capriciously or negligently to extend any waiting period under 5 U.S.C. 1121 through the mere device of failing to determine, *before the waiting period expired,* whether federal employees subject to agency jurisdiction had competently performed their work during the waiting period involved. However, in the case at bar, the Veterans Administration candidly conceded (Govt.'s E. 3, pg. 3):

> "The due date . . . was June 23. The Deputy Vice Chairman's memorandum was dated and delivered June 26, 1963. *It follows that the Veterans Administration requirement of written notice 'before' the due date was not literally complied with.*" (Emphasis supplied).

Thus, this case presents a second set of very important questions insofar as the Council and its constituent unions and members are concerned. May a federal agency ignore, violate or negligently overlook the requirements of its own Regulations in the denial of statutory in-grade pay increases; and may it thereby wait, in contravention of the prohibitions of those Regulations, until after a pay increase has already become due under 5 U.S.C. 1121 to notify a federal employee that the agency has decided that he is not eligible to receive that increase in pay? Or, having admittedly failed to comply with its *own* agency Regulation which speci-

fies that, under 5 U.S.C. 1121, each employee *MUST be fully and specifically notified in writing prior to the end of the statutory waiting period that the agency has determined he is not eligible,* may the agency nevertheless sustain its illegal denial of the increase by alleging, as the Court of Claims held, that the employee should have surmised (from various conversations and correspondence he had with one of his supervisors) that his work was below average—*albeit such conversations and correspondence concededly were never intended by the supervisor or the employee involved to constitute the statutory determination as to the right of the employee to receive the pay increase provided by 5 U.S.C. 1121?*

The Council submits that such loose procedures, if approved by this Court, would constitute an open invitation to administrative arbitrariness and capriciousness by federal agencies—and classified federal employees, who in many cases are unfortunately subject to the whims of unfair or biased supervisors, would never be certain when an agency had actually or finally decided that they were not eligible for the statutory pay increase provided by 5 U.S.C. 1121. A resulting situation of even *greater importance* is that such federal employees would be left completely in the dark as to when their right to appeal to the Civil Service Commission from an adverse determination, as authorized under 5 U.S.C. 1121, as amended by Congress in 1965, actually might accrue. Under the Court of Claims decision, that right conceivably could accrue merely on the strength of a conversation conducted between the employee and his supervisor several months *before* the statutory waiting period necessary for the pay increase provided under 5 U.S.C. 1121; or under

the Court of Claims decision, that right might be postponed or defeated by the agency through the simple device of delaying a final determination of eligibility until after the pay increase was due under 5 U.S.C. 1121.

The Council earnestly suggests that again, therefore, this Court should grant the petition for certiorari herein and settle the important questions thus presented once and for all. Such action is particularly necessary in the case of veterans' preference federal employees who are entitled to the benefits and statutory safeguards prescribed by the Veterans Preference Act of 1944, as amended. In the case at bar, the petitioner contended, quite correctly the Council believes, that once the statutory pay increase accrued in his favor at the end of the statutory waiting period prescribed by 5 U.S.C. 1121, that pay increase could not be taken away from him by the Veterans Administration *except as provided in the Veterans Preference Act* (5 U.S.C. 863). The latter Act, of course, states that no veteran federal employee shall be reduced in compensation unless and until he receives 30 days' advance written notice, until he afforded the opportunity fully to defend against the proposed reduction, and in the event of an unfavorable agency decision, is given the "right to appeal to the Civil Service Commission". In this case, none of these statutory safeguards were afforded to the petitioner and he was affirmatively notified by the Agency that he had no rights whatsoever under the Veterans Preference Act. The Court of Claims thereafter avoided the very serious questions, thus raised, by holding simply that it did not consider it necessary to "test the sting . . . of this argument" in the case at bar.

Consequently, the Court of Claims has left all other veterans preference classified federal employees in the position where they might be subject to the denial of a statutory pay increase several days or even several months after same has fallen due under 5 U.S.C. 1121, only to be told by the agency that this reduction in their statutory pay has been accomplished without any necessity for compliance with the Veterans Preference Act of 1944. Certainly, this is the gravamen of the Court of Claims decision in the case at bar, and the Council believes that any such holding, expressly or implied, is erroneous and that it should be overruled by this Court.

III

5 U.S.C. 1121, as Applied in the Instant Case Arbitrarily and Capriciously to Deny Petitioner's Statutory Pay Increase, Is Unconstitutional

At pages 9 to 11 of the petition for certiorari herein, petitioner outlines the very arbitrary and capricious system and manner employed by the Veterans Administration to deprive him of the statutory pay increase prescribed by Congress in 5 U.S.C. 1121. This discriminatory action, the Council believes, stems from the fact that the performance evaluation system used by the Agency was unlawfully adopted and administered without *advance approval* of the Civil Service Commission, in violation of the prohibitions of 5 U.S.C. 2003.

But, as the Court of Claims suggested in its decision —"Mishandled discretion can, of course, be set aside". Unlike the Court of Claims, however, which finally failed to set aside the said "Mishandled discretion", the Council urges this Court to find that 5 U.S.C. 1121, *mishandled and arbitrarily applied as it was in the*

case at bar, is violative of Article I, Sections 1 and 8 of the Constitution and of the Fifth Amendment to the Constitution.

This question, of course, is as important to the Council and its constituent unions and federal employee members as those set forth in Sections I and II of this brief. Thus, if the Court grants the petition for a writ of certiorari herein, as the Council urges it to do, then the Council hereby seeks leave to be heard further on this phase of the case involving the constitutionality of 5 U.S.C. 1121, as it was arbitrarily and capriciously applied to deny petitioner his statutory increase in pay without due process of law.

CONCLUSION

The Amicus Curiae respectfully submits, for the reasons stated, that the petition for writ of certiorari herein should be granted and the decision of the Court of Claims reversed.

Respectfully submitted,

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APPENDIX A

I. The Performance Ratings Act, enacted by Congress in 1950, provides at 5 U.S.C. § 2003:

> "*Other rating procedures prohibited*—No officer or employee of any department shall be given a performance rating, *regardless of the name given to such rating,* and no such rating shall be used as a basis for any action, except under a performance-rating plan approved by the Civil Service Commission as conforming with the requirements of this chapter." (Italics supplied)

The said Performance Ratings Act of 1950 also provides at 5 U.S.C. 2004:

> "*Requirements for performance-rating-plans*—Performance-rating plans required by this chapter shall be as simple as possible, and each such plan shall provide—
>
> (1) that proper performance requirements be made known to all officers and employees;
>
> (2) that performance be fairly appraised in relation to such requirements; . . .
>
> (5) that each officer and employee be kept currently advised of his performance and promptly notified of his performance rating."

The said Performance Ratings Act further provides, at 5 U.S.C. 2005, in pertinent part:

> "*Ratings for Performance; warning prior to rating of unsatisfactory* . . . No officer or employee shall be rated unsatisfactory without a ninety-day prior warning and reasonable opportunity to demonstrate satisfactory performance."

Finally, the said Performance Ratings Act of 1950 provides at 5 U.S.C. 2007, as here pertinent:

> *"Regulations; inspection and revocation of approval of plans . . .*
>
> (b) The (Civil Service) Commission shall inspect the administration of performance rating plans by each department to determine compliance with the requirements of this chapter and the regulations issued thereunder.
>
> (c) Whenever the Commission shall determine that a performance rating plan does not meet the requirements of this chapter and the regulations issued thereunder, the Commission may, after notice to the department, giving the reasons, revoke its approval of such plan.
>
> (d) After such revocation, such performance-rating plan and any current ratings thereunder shall become inoperative, and the department shall thereupon use a performance-rating plan prescribed by the Commission."

II. Until October, 1962, classified officers and employees of the United States compensated on a per annum basis were, in accordance with the provisions of 5 U.S.C. 1121 (B), entitled to periodic step increases in pay subject to the condition, *inter alia,*

> "(B) That he has a current performance rating of 'Satisfactory' or better . . ."

In 1962, Congress, by Public Law 87-793, amended 5 U.S.C. 1121 (B) to make it read as follows:

> "(B) That his work is of an acceptable level of competence as determined by the head of the department . . ."

In 1965, *prior to the decision of the Court of Claims herein,* Congress further amended 5 U.S.C. 1121 by adding thereto a new subsection (c), which reads as follows (Public Law 89-301):

> "(c) Whenever a determination is made under subsection (a) of this section that the work of an officer or employee is not of an acceptable level of competence, he shall be given prompt written notice of that determination and an opportunity for reconsideration of the determination within his department under uniform procedures established *by the Commission.* If the determination is affirmed upon reconsideration, the employee shall have *a right of appeal to the Commission.* If the reconsideration on appeal results in a reversal of the earlier determination, the new determination shall supersede the earlier determination and shall be deemed to have been made as of the date of the earlier determination . . ." (Italics supplied)

Regarding the procedure to be followed in cases where employees are to be denied step increases in pay because of an alleged *unacceptable level of competence,* the Veterans' Administration's own Regulations state (VA Manual MP-5, Chap. 2, Interim Issue 5-169 dated 10/18/62):

> "*Notifications to employees*— . . . Employees on whom a determination is made that performance is not of an acceptable level of competence *must* be so notified in writing. Except for those determinations required with respect to an effective date of October 14, 1962, by reason of the provisions of the Federal Salary Reform Act of 1962, *the notification shall be given prior to the date on which the time-in-grade requirements for within-grade step increase will be met.* This notification shall be signed by the supervisor making the original determination and the higher-level supervisor having responsibility for con-

firming such unfavorable determinations. The notification shall include:

(a) Reasons for the determination, including specific areas in which the employee's performance has been less than competent. (NOTE:—Where the determination is based on a pending 90-day warning of unsatisfactory performance or a written notice of intent to demote or remove for cause, reference to such fact will suffice.)

(b) The date, within the next 52 calendar weeks, by which a new determination will be made.

(c) The employee's right upon written request within 10 days of his receipt of the notification, to seek reconsideration of the determination. Information about how to initiate such reconsideration also should be included.

(d) A statement that a copy of the notification will be placed in the employee's official personnel folder." (Italics supplied)

III. The Veterans' Preference Act of 1944 (58 Stat. 390, 5 U.S.C. § 863) provides, in pertinent part:

"No permanent or indefinite preference eligible, who has completed a probationary or trial period employed in the civil service, or in any establishment, agency, bureau, administration, ... or department . . . shall be discharged, suspended for more than thirty days, furloughed without pay, *reduced* in rank *or compensation* . . . except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose . . . reduction in rank or compensation is sought shall have at least thirty days' advance written notice . . . stating any and all reasons, specifically and in detail, for any such proposed action; *and such preference eligible shall . . . have the right to appeal to the Civil Service Commis-*

sion from an adverse decision of the administrative officer so acting, such appeal to be made in writing wtihin a reasonable time after the date of receipt of notice of such adverse decision: *Provided,* That such preference eligible shall have the right to make a personal appearance, or an appearance through a designated representative, *in accordance with such reasonable rules and regulations as may be issued by the Civil Service Commission;* after investigation and consideration of the evidence submitted, *the Civil Service Commission shall submit its findings and recommendations to the proper administrative officer . . . and it shall be mandatory for such administrative officer to take such corrective action as the Commission finally recommends . . .*" (Italics supplied)

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 1a–10a) is not yet reported.

JURISDICTION

The judgment of the Court of Claims was entered on February 18, 1966. The petition for a writ of certiorari was filed on May 19, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the Veterans' Administration unlawfully declined to grant petitioner a within-grade salary increase for the reason that his work was not of an

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"acceptable level of competence," as required by the Federal Salary Reform Act of 1962.

STATUTE INVOLVED

The Federal Salary Reform Act of 1962, Sec. 603, 76 Stat. 847, 5 U.S.C. 1121, provides in pertinent part:

> (a) Each officer or employee compensated on a per annum basis, and occupying a permanent position within the scope of the compensation schedules fixed by this chapter, who has not attained the maximum rate of compensation for the grade in which his position is placed, shall be advanced in compensation successively to the next higher rate within the grade at the beginning of the next pay period following the completion of (1) each fifty-two calendar weeks of service in salary rates 1, 2, and 3, or (2) each one hundred and four calendar weeks of service in salary rates 4, 5, and 6, or (3) each one hundred and fifty-six calendar weeks of service in salary rates 7, 8, and 9, subject to the following conditions:
>
> * * * * *
>
> (B) That his work is of an acceptable level of competence as determined by the head of the department * * *.
>
> * * * * *

STATEMENT

Petitioner brought this action in the Court of Claims to recover $365 plus any additional back-pay that he alleged was or may be owing him as a result of his being denied a within-grade salary increase after he had become eligible for such an increase.

The basis of the denial was the refusal of his supervisors to certify that "his work [was] of an acceptable level of competence," as required by Sec. 603 of the Federal Salary Reform Act of 1962, 76 Stat. 847, 5 U.S.C. 1121. The Act provides that every government employee compensated on a per annum basis shall be advanced in compensation successively to the next higher rate within the grade provided that the employee meets certain enumerated conditions, including "[t]hat his work is of an acceptable level of competence as determined by the head of the department."

Petitioner was an attorney employed by the Veterans Administration Board of Veterans Appeals to draft Board opinions (Pet. App. 1a–2a). The Board has detailed written standards for the measurement of its attorneys' work performance, which give numerical grades for the quantity and quality of the employee's production as well as for his overall performance (Pet. App. 2a; Def. Exh. 1, p. 1).[1] Petitioner was informed at the end of each calendar quarter of his standing as measured by the Board's performance criteria, and was told weekly of the recorded amount of his production (Pet. App. 6a; Def. Exh. 1, p. 2). In June, August, September and December 1962, and at other times as well, his supervisor personally discussed the fact that his performance was far below the standard expected of attorneys of his grade (Pet. App. 6a; Def. Exh. 1,

[1] "Def. Exh." refers to the exhibits attached to the motion for summary judgment filed in the Court of Claims. They are included in the record filed with this Court.